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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1333

FRANK WOLFE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner, Frank Wolfe, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on March 20, 1972, which reversed the judgment of the United States District Court for the Eastern District of New York (Dooling, *J.*).

Opinion Below

On March 20, 1972, the United States Court of Appeals for the Second Circuit unanimously reversed the judgment of the District Court. The opinion is not officially reported. It is annexed, however, to the instant petition as Exhibit A.

Jurisdiction

The order of ~~affirmance~~ REVERSAL of the United States Court of Appeals for the Second Circuit was made on March 20, 1972. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C., Section 876, 28 U.S.C., Section 877.

Questions Presented

1. Can probable cause be transferred to a petitioner far removed from the scene where the "clearly suspicious" scattering of vehicles occurred?

2. In light of *Wong Sun* v. *United States,* 371 U.S. 471 (1963), is not the "scattering" of three vehicles too ambiguous to constitute probable cause where the F.B.I. agents had been in unmarked cars and had not as yet announced themselves?

Statement

The judgment was rendered on June 18, 1971 by the Honorable John F. Dooling, Jr., Judge of the United States District Court for the Eastern District of New York; granting the motion to suppress as to this petitioner and denying the motion as to three co-defendants who did not appeal and subsequently pleaded guilty. The indictment charging the violation of 18 U.S.C., Secs. 659 and 2 is still pending only as to this petitioner.

The Facts

The petitioner, Frank Wolfe, was the proprietor of a service station which also rented out U-Haul type trucks and had a parking lot on the premises for other similar vehicles. Based upon the affidavit of Special Agent Taylor of the F.B.I. a search warrant was obtained on October 15, 1970. The affidavit except for totally innocent observations

of Agent Taylor relied completely on information passed on by an informer who received it from another person and did not state the basis of his information.

The F.B.I. agents did not execute the warrant but set up a surveillance of the station and observed three vehicles leave including a U-Haul truck. They followed the truck and the two cars for a short time and then placed the three drivers under arrest and returned to the station without searching the truck. At the station the petitioner was placed under arrest also at which time the keys were taken from him.

In granting the motion to suppress the keys, Judge Dooling said:

> "The affirmative evidence as to Mr. Wolfe was he had not been seen to have any contact with either of the U-Hauls at all other than simply directing them and getting them out of his parking lot; and that seems to me the kind of totally unsuspicious conduct that a man appearing to protect his stock of rentable trucks, disaster would indulge in. It does not mean that he is part of it."

ARGUMENT

POINT I

The District Court properly distinguished between the right to search the trucks and the right to make a search incidental to an arrest at a place far removed.

Judge Dooling found that at the time the agents returned to the service station they had not seen the contents of any of the trucks involved, including the one which had been stopped while traveling in the caravan. The record is clear that the only contact Wolfe had with any of the

trucks was in directing the one truck out of his parking lot in broad daylight, totally reasonable conduct for a station owner trying to avoid accidents. The informer had allegedly told the agent that the station was being used as a drop for stolen goods but never stated that Wolfe personally was involved. Wolfe did not take part in the caravan but remained at his business of running a service station, parking lot, and rental of U-Haul type trucks.

This Court has delineated those situations justifying the searches of moving vehicles without the necessity of an arrest warrant or a search warrant. *Preston* v. *United States*, 376 U.S. 364, 84 S. Ct. 881 (1964); *Chambers* v. *Maroney*, 399 U.S. 42, 90 S. Ct. 1975 (1970); *Coolidge* v. *New Hampshire*, 403 U.S. 573, 91 S. Ct. 2022 (1971). Cf. *United States* v. *Payne*, 429 F.2d 169 (CA 9, 1970). But the warrantless arrest of Wolfe without probable cause and the search incident thereto at a place substantially removed from the seizure of the truck in the caravan cannot be justified as a search incidental to a lawful arrest. *Harris* v. *United States*, 331 U.S. 145, 67 S. Ct. 1098 (1947).

POINT II

The Government's reliance on *United States* v. *Manning* is misplaced.

In *United States* v. *Manning*, 448 F.2d 997 (2d Cir. 1971) the Court of Appeals held that probable cause for a search existed where an informant who had not been previously reliably communicated information to the narcotic agents that a sale of narcotics was going to take place at a particular time and place and that he would telephone them when he was sure that the narcotics were present. He gave them other preliminary information of Manning's prior criminal background which checked out and then telephoned that the sale was actually taking place. When the agent knocked on the door they heard suspicious noises and entered.

In this case the informer did not tell the F.B.I. agent that he had been at the service station himself, or that he had seen the whiskey, but did tell the agent that he had received the information from someone else and the agent did not state who this other party was.

The distinction between the cases is clear. Wolfe himself was never discussed by the informant, the stolen property itself had not even been seen by the agents or by the informer, the basis of the informer's information was unknown, the agents arrested Wolfe before making the search and attempted to justify the seizure of the keys from the person of Wolfe as incidental to a lawful arrest.

It is clear that Judge Dooling was correct in ruling that there was no probable cause for the arrest of Wolfe.

POINT III

The "scattering" of the vehicles was not enough to sustain probable cause.

The Court of Appeals in reversing the District Court relied too heavily on "the subsequent scattering on signal" of the three motor vehicles. To draw this inference of consciousness of guilt from such ambiguous conduct where the F.B.I. agents had not announced themselves; allowed their presence to be known; or made any move to close in on the motor vehicles driven by the suspects runs contrary to the principle set forth in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Since the search warrant was invalid and the tip given by the informer did not include the basis of his information the Government must look to other circumstances to sustain the arrests. The fact situation is weaker than in *Wong Sun* where the suspect immediately started to flee when the agents identified themselves. If that was insufficient to

reach the stature of probable cause certainly no more weight should be given to the speedy departure of two of the three vehicles in this case. The significance becomes even more tenuous when it must be applied to determine the probable cause to arrest the petitioner, some distance away at his service station.

CONCLUSION

It is respectfully prayed that the petition for a writ of certiorari be granted.

Respectfully submitted,

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MARK A. LANDSMAN,
Of Counsel.

APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 544—September Term, 1971.

(Argued February 24, 1972 Decided March 20, 1972.)

Docket No. 71-1835

UNITED STATES OF AMERICA,

Appellant,

—against—

FRANK WOLFE,

Appellee.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, granting appellee's motion to suppress evidence seized from his person on the ground that the federal agents lacked probable cause to arrest him.

Reversed.

EDWARD R. KORMAN, Assistant United States Attorney (Robert A. Morse, United States Atorney, Eastern District of New York, David G. Trager, Asst. United States Attorney, of counsel), *for Appellant.*

RICHARD I. ROSENKRANZ, Brooklyn, New York, *for Appellee.*

PER CURIAM:

This is an appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* granting the motion of the appellee Frank Wolfe to suppress keys taken from him upon his arrest. We reverse.

The defendant Frank Wolfe was the proprietor of a gasoline station in Brooklyn known as the Four Star Service Station. On October 13, 1971, the Federal Bureau of Investigation was advised that a large quantity of Canadian Club liquor had been hijacked. On October 14, 1971 a special agent of the F.B.I., who headed the hijacking squad, received a phone call at home from an informant, who had previously given reliable information, advising that a member of the group which had hijacked the liquor had told the informant that the stolen Canadian Club liquor was stored in two U-Haul trucks at the Four Star Service Station. This special agent also had been advised by another agent of his squad that a reliable informant had indicated that the Four Star Service Station was being used as a drop for stolen merchandise. A surveillance of the station on October 14 disclosed that two U-Haul trucks were parked there. Four Star was a franchised Ryder Truck Rental Agency. On October 15, 1971 the F.B.I. procured a search warrant to search the vehicles. The surveillance continued until the afternoon of October 16, 1971, and during all of this time no other U-Haul trucks were seen to enter or leave the Four Star premises. At about 1:15 p.m. on October 16, 1971 an entourage of three vehicles was seen to leave the garage—a brown Buick, followed by one U-Haul truck, followed by a green Cadillac—personally directed out by Wolfe. After driving a few blocks in procession, followed by three unmarked F.B.I. cars, the operator of the brown Buick was seen to make a rapid set of gestures to the following truck. The Cadillac picked up speed and passed the truck and the Buick. The F.B.I. intercepted the three and arrested the occupants. All vehicles

and drivers were escorted back to the garage. At that point, Wolfe was arrested. Plainly visible, hanging from his belt was a set of keys. The keys were taken from him by an agent and were used to open the two U-Hauls, which contained the stolen Canadian Club liquor, as well as a Ryder truck which contained stolen stereo equipment.

The District Court, although expressing misgivings concerning the validity of the October 15th search warrant for the vehicles, did find that the search of the vehicles on October 16th was lawful in view of the behavior of the caravan on that afternoon which corroborated and reinforced the initial information of the informants. The District Court therefore denied the motion to suppress the contents of the U-Haul trucks, but did grant Wolfe's motion to suppress the keys, finding no probable cause for his arrest and the incidental search. It is not disputed that if the arrest was lawful, the personal search which resulted in the seizure of the keys, was proper. *Chimel* v. *California*, 395 U.S. 752 (1969).

The facts are not in controversy, and there is no issue of credibility of the witnesses. The court below characterized Wolfe's conduct in directing the three car procession out of the garage as "totally unsuspicious" and his only connection with the crime. We find this to be error. This fact cannot be viewed in isolation; the evidence must be viewed in its totality *United States* v. *Manning*, 448 F.2d 992, 998-99 (2d Cir. 1971) (*en banc*). Looking at the totality of the evidence, the agents did have probable cause to arrest Wolfe and take the keys which were hanging from his belt in plain view. One previously reliable informant had advised the F.B.I. that the stolen Canadian Club was to be found in the two U-Haul trucks at the garage; the two vehicles matching the description were observed there and none others were observed there during the surveillance. Another previously reliable informant had described the premises generally as a "drop" for stolen goods. The caravan (Buick-truck-Cadillac), which Wolfe directed out of the

garage, would not seem to be the normal procession of routine business. The subsequent scattering on signal was clearly suspicious and justified the search of the vehicles. This maneuver corroborated the information that the garage was a "drop". Under the circumstances here we cannot sensibly separate the character of the situs from that of its proprietor. It is not reasonable to assume that two truckloads of high price, high proof liquor would be entrusted to the casual custodianship of a public garage on a busy street in Brooklyn for several days without the assurance of some degree of cooperation and knowledge on the part of the proprietor. The only alternative left to the agents was to smash open the truck if they could not use the keys. Here the agents proceeded sensibly; they had obtained a search warrant and there was no indication of threats, force or violence on their part.

Reversed.

SUPREME COURT, U. S.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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FRANK WOLFE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted in the United States District Court for the Eastern District of New York for having knowingly possessed stolen merchandise—two truckloads of hijacked whiskey—in violation of 18 U.S.C. 659. The district court granted a pre-trial motion to suppress certain keys taken from petitioner at the time of his arrest. On appeal under 18 U.S.C. 3731, the court of appeals reversed *per curiam*, holding that the totality of circumstances established probable cause to believe that petitioner was involved in the unlawful activity (Pet. App. 1a–4a).

The facts are not in dispute and are set forth in the opinion below. The court of appeals properly held that

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the district court took too isolated a view of petitioner's conduct in holding that his act of directing the three car procession out of the garage was "totally unsuspicious." (Pet. App. 3a). The officers had information from a previously reliable informant that petitioner's garage was being used as a drop for stolen merchandise, and the circumstances creating probable cause to arrest petitioner's codefendants necessarily implicated him, since it was unlikely that the codefendants would entrust stolen merchandise to an innocent stranger. The opinion below persuasively demonstrates that the overall circumstances established probable cause for the arrest of petitioner and the taking of his keys. (Pet. App. 3a–4a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE, 1972